83-1467

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CARL VAINIO, Petitioner

V.

STATE OF MAINE, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT SITTING AS THE LAW COURT OF THE STATE OF MAINE

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The Petitioner, CARL VAINIO, prays that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Judicial Court sitting as the Law Court of the State of Maine rendered in these proceedings on October 5, 1983.

QUESTION PRESENTED FOR REVIEW

Can a felony conviction secured on the basis of a guilty plea by an uncounselled, illiterate minor in 1962 be used as the basis for conviction of violation of Title 15, Maine Revised Statutes Annotated, Chapter 15, Section 393.1? 15 M.R.S.A. §391.1 reads, in pertinent part:

> 1. **Possession Prohibited.** No person who has been convicted of any crime, under the laws of....the State of Maine....which is punishable by one year or more imprisonment....shall own, have in his possession or under his control any firearm, unless such a person has obtained a permit under this section.

Table of Contents

XI. Appendix

Table of Authorities

Cases - U.S. Supreme Court

Other Federal Cases

Maine Cases

United States Constitutional Provisions

Federal Statutes

Maine Statutes

OPINION BELOW

The official report of the decision in this case before the Law Court of the State of Maine appears as: State of Maine v. Carl Vainio, 466 A.2d 471 (Me. 1983).

JURISDICTION

The grounds on which jurisdiction of this Court is invoked are:

(i) The decree sought to be reviewed was dated October 5, 1983 and entered on October 5, 1983 as Decision No. 3341 under Law Docket No. Pen. 82-343. (See Appendix 1 at Page A-1.)

(ii) An order denying a timely motion for rehearing was dated and entered January 4, 1984. (See Appendix 2 at Page A-30.)

(iii) An order, A-325, Staying Execution of Sentence was issued by Associate Justice William J. Brennan, Jr. of the United States Supreme Court on the first day of November, 1983.

(iv) 28 U.S.C. §1257(3) confers on this Court jurisdiction to review the judgment in question.

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right....to have the Assistance of Counsel for his defence.

Amendment XIV - Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Maine Revised Statutes Annotated

Title 15, Chapter 15 Possession of Firearms by Felons §392. Application.

The penal provisions of section 393 shall not apply to any person employed as a law enforcement officer or employed by a watch, guard or patrol agency licensed under Title 32, chapter 89 or chapter 93. (Title 32, chapters 89 and 93 are not relevant to the determination of this case.)

Section 393. Subsection 1. Possession Prohibited.

No person who has been convicted of any crime, under the laws of the United States, the State of Maine or any other state, which is punishable by one year or more imprisonment or any other crime which was committed with the use of a dangerous weapon or of a firearm against a person, except for a violation of Title 12, chapter 319, subchapter III, shall own, have in his possession or under his control any firearm, unless such a person has obtained a permit under this section. For the purposes of this subsection, a person shall be deemed to have been convicted upon the acceptance of a plea of guilty or nolo contendere or a verdict or finding of guilty by a court of competent jurisdiction.

Section 393, Subsection 8. Penalty.

A violation of subsection 1 is a Class C Crime.

Title 17-A Chapter 51 Section 1252.2

The court shall set the term of imprisonment as follows:
...

C. In the case of a Class C Crime, the court shall set a definite period not to exceed 5 years;

Title 17-A Chapter 53 Section 1301.1

1. A natural person who has been convicted of a Class B, Class C, Class D or Class E crime may be sentenced to pay a fine, unless the statute which the person is convicted of violating expressly provides that the fine and imprisonment penalties it authorizes may not be suspended, in which case the convicted person shall be sentenced to the imprisonment and required to pay the fine authorized therein. Subject to such sentences and to section 1302, the fine which shall not exceed:

A-1. $2,500 for a Class C Crime;
....

STATEMENT OF FACTS

In September, 1961, Carl Vainio was indicted by the grand jury in Piscataquis County, Maine, for stealing brass pipes belonging to Guilford Woolen Mills, Inc., alleged to be of the value of one hundred ninety-two dollars and twenty cents ($192.20), a felony under R.S. Ch. 132; §1 (1954). At his arraignment in March, 1962, Vainio pleaded guilty to the charge and was sentenced to the Men's Reformatory. The execution of the sentence was suspended, however, and he was placed on probation for a period of two years. A special condition of probation consisted of his making restitution in the sum of ninety-six dollars and twenty cents ($96.20). Under R. S. Ch. 132, §1, (1954), it would not have been a felony to have stolen $96.20 worth of property.

Carl Vainio was and is illiterate. He was, in March of 1962, a minor under Maine law, having then attained the age of 18 years. Carl Vainio entered his plea to the alleged felony without the assistance of counsel. He was indigent.

The record does not indicate a full inquiry with respect to Carl Vainio's knowledgeable waiver of assistance of counsel. The printed record indicates only:

> Respondent inquired of if he wished Counsel, REPLY: No.
> 466 A.2d at 473. (Appendix at A-4; hereafter A-4)

The 1962 conviction has never been vacated nor has Carl Vainio ever been pardoned in connection with it.

On December 31, 1981, Carl Vainio was arrested and subsequently charged with

attempted aggravated assault, criminal threatening with a firearm, and violation of 15 M.R.S.A. §393, to wit, having in his possession or under his control a firearm and being a person who had been convicted on March 16, 1962, of the crime of larceny, a felony under the laws of the State of Maine punishable by one year or more imprisonment.

At the trial, the charge of attempted, aggravated assault was dismissed on motion. The evidence at trial indicated, and Carl Vainio did not deny, that he did in fact have in his possession on December 31, 1981, two firearms, a .357 magnum and a .270 Browning rifle. The jury found Carl Vainio not guilty of criminal threatening with a firearm.

Carl Vainio was convicted of violation of 15 M.R.S.A. §393 on the

foregoing facts. The law which made Carl Vainio's possession of the two firearms illegal became effective in 1977. Prior to that time, the Maine law restricting the possession of firearms by felons was limited to concealed weapons and was limited to a period of 5 years.

MANNER OF RAISING FEDERAL QUESTIONS

The decision of the Law Court of the State of Maine, 466 A. 2d at 472,(A-2), shows that on appeal Vainio contended, as the third of his three arguments:

> (3) that his 1962 felony conviction of larceny was null and void, in that it was obtained as a result of his plea of guilty to the charge without the benefit of his constitutional right to assistance of counsel.

This issue was considered properly preserved for appeal by the Maine Law Court. Otherwise, the Law Court would not

have dealt with it. See State v. Kessler, 453 A. 2d 1174 (Me. 1983).

This issue was first raised by defendant at the trial level by means of a request to the trial justice to read Baldasar v. Illinois, 446 U.S. 222 (1980), and to rule, based on that case, that Carl Vainio could introduce evidence about his 1962 conviction and, if it proved to be void, have the conviction disregarded for purposes of this case. Critical portions of the trial transcript are included as Appendix 3 at Page A-31. The trial court denied the requests to introduce the evidence and ruled as follows:

> What we're going into is whether or not he was in fact convicted of a felony period. If he was, the next thing is did he possess a firearm....And that' what the law is going to be that I'm going to give the jury in this case. Your respective positions are clear on the record and you can take them up

eventually at the appropiate place. Trial Transcript, Page 211.

ARGUMENT

1. Baldasar v. Illinois requires that this case be reversed.

Carl Vainio, in March, 1962, was an indigent, illiterate, minor defendant charged with a crime punishable by imprisonment for not more than five years. He pleaded guilty without the assistance of counsel. Vainio was sentenced to actual imprisonment. The execution was suspended, however, and he was placed on probation for a period of two years. This constituted a deprivation of liberty. It also constituted a violation of the standard later expressed in Scott v. Illinois, 440 U.S. 367 (1979).

> We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that

> no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense. 440 U.S. at 373-74.

Vainio was sentenced to a term of imprisonment without having knowingly and intelligently waived his right to counsel.

Because Vainio was required to return only $96.20, it is more than likely that he was in fact found guilty of committing acts which were sufficient to support only a misdemeanor conviction. He did not, apparently, understand that. What better example of the kind of problem for which an illiterate minor needs "the guiding hand of counsel"? Powell v. Alabama, 287 U.S. 45, 69 (1932). This case is a felony case as to which the right to counsel was established by Gideon v. Wainwright, 372 U.S. 335 (1963), but it is controlled by the policy of Baldasar v. Illinois.

Under Baldasar, an uncounselled misdemeanor conviction could not be considered the first offense under a statute which provided that two offenses at the misdemeanor level constituted a felony for which the defendant could be and was sentenced to prison for a term in excess of one year.

In this case, the defendant's uncounselled conviction, which was by law a felony conviction but which probably should have been, in fact, a misdemeanor conviction, in 1962 was the only basis upon which he could have been or was convicted of violation of 15 M.R.S.A. §393 in 1982. This was not a sentence enhancing statute. It was a crime creating statute. It created a crime based on Carl Vainio's status. The status had been established in 1962 following a procedure made

unconstitutional by Gideon v. Wainwright. The crime was created in 1977.

Carl Vainio's illiteracy and minority add, as they did in Powell v. Alabama, supra, to the necessity to ensure the fairness of his trial process. They make the Baldasar reasoning more, rather than less, appropriate.

As a logical consequence of the holding in Baldasar v. Illinois, an uncounselled felony conviction can not be used as a predicate to establish a person's status as a criminal based on subsequent and otherwise legal acts. As interpreted by the Maine Law Court, 15 M.R.S.A. §393.1 permits use of such a conviction, and it is repugnant to the sixth and fourteenth amendments to the Constitution of the United States. If the prior conviction may not be attacked

collaterally in the prosecution under this section, the preexisting constitutional violation infects this prosecution. The Maine Law Court's decision, therefore, must be reversed.

2. Lewis v. United States does not apply.

Although the Maine Law Court expressly stated: "We agree with the principles set forth in Lewis," 472 A.2d at 477 (A-23) the principles of Lewis v. United States 445 U.S. 55 (1980) do not apply. The facts are different.

Lewis was convicted of violating 18 U.S.C. App. §1202(a)(1) which prohibits convicted felons, among others, from later possessing firearms. The original conviction on which the prosecutors relied

to establish Lewis's status as a felon had been obtained unconstitutionally because Lewis had not been afforded the right to counsel at his first trial.

There was no evidence that Lewis was an illiterate minor when first convicted of the predicate offense. While the theory of the holding of Lewis does not rest on the defendant's competence, the facts there assumed did not introduce this as an issue.

The purpose of 18 U.S.C. App. §1202(a)(1) was broad, expansive and prophylactic. As Justice Blackmun said for the Court:

> Section 1202(a) was a sweeping prophylaxis, in simple terms, against misuse of firearms.... Those sections not only impose a disability on a convicted felon but also on a person under a felony indictment,

> even if that person subsequently is acquitted of the felony charge. Since the fact of mere indictment is a disabling circumstance, a fortiori the much more significant fact of conviction must deprive the person of a right to a firearm. 445 U.S. at 63-64.

The Court placed reliance on the fact that Congress was reacting, in enacting §1202(a)(1), to "the precipitous rise in political assassinations, riots, and other violent crimes involving firearms that occurred in this country in the 1960's." 445 U.S. at 63.

In that context, the Lewis rationale may make sense. 15 M.R.S.A. §393 was not enacted in that context. Its predecessor statute was on the books before 1960.

This Court traditionally defers to the State court of ultimate jurisdiction in determining the meaning of state statutes.

The Maine Law Court has specifically found the purpose of 15 M.R.S.A. §393 in the case of State v. Heald, 382 A.2d 290 (Me. 1978). At the time Heald was decided, the prohibition in §393 was only on concealable weapons, but the reasoning applies to the statute as amended. The Maine Law Court said:

> It would appear that the Legislature viewed firearms concealable on the person as tools of the trade in the criminal world. It must have considered their possession by persons found guilty of serious crimes as presenting a high potential of danger to the public generally and as enhancing to a high degree the probability that the convicted individual would continue his criminal activity. The Legislature could justifiably conclude that there was need for gun control legislation in the case of convicted criminals the moment the person has been found guilty of a serious crime; to except from the operation of 15 M.R.S.A., §393 felons whose judgment of conviction is pending on appeal would be inconsistent with the obvious legislative purpose of deterrence and

> rehabilitation which the broad language of the enactment indicates. 382 A.2d at 295. Emphasis added.

The Maine statute was designed to deter the convicted felon and to rehabilitate him. It was aimed at the felon, not at the firearm. The federal statute was aimed at the firearm, not at the felon. It prohibited possession not only by convicted felons, but also by any person under indictment, by mental incompetents, and by illegal aliens. A statute with a purpose as broad as §1202(a)(1) may encompass the use of unconstitutional convictions. A statute aimed at rehabilitating a particular felon cannot.

The Maine statute is even further circumscribed by §392, which immediately precedes §393. That section provides:

> The penal provisions of section 393 shall not apply to any person

> employed as a law enforcement officer or employed by a watch, guard or patrol agency license (sic) under Title 32, Chapter 89 or Chapter 93.

Thus, a validly convicted felon serving as a night watchman, janitor or secretary for a guard agency has no disability, while a person convicted of a felony in violation of the United States Constitution remains disabled.

Since the Maine Statute disables only some felons, and only for the purpose of deterring and rehabilitating them, it is fair to ask that the law only deter and rehabilitate people who really are felons - that is those who have been validly convicted of felonies. Lewis v. United States does not apply.

3. Lewis v. United States should be overturned.

Justice Powell, in his Baldasar dissent, found the Baldasar decision:

> all the more puzzling in view of the court's recent ruling in Lewis v. United States (citation omitted). Lewis held that an uncounselled felony conviction is a proper predicate for imposing federal sanctions for possession of a firearm by a felon. Although I dissented on statutory grounds in Lewis, the opinion's constitutional holding squarely conflicts with today's decision. Unlike misdemeanors, all uncounselled felony judgments are constitutionally invalid. (Citation omitted.) Yet Lewis held that even though the federal firearms statute imposes a prison sentence solely because the defendant had an uncounselled - and thus void - felony conviction on his record, that procedure does not use the void conviction to "'support guilt or enhance punishment.'" (Citation omitted). In this case, the court refuses to permit sentence enhancement on the basis of a constitutionally valid misdemeanor conviction. The conflict between the two holdings could scarcely be more violent. 446 U.S. 222, at 234, n. 3.

It is the Lewis decision and not the Baldasar decision which is out of step. The Maine Law Court, while relying on Lewis, pointed to the harsh treatment that Lewis has received from the commentators.

> The Lewis decision has received much criticism, especially from the dissenters. Commentators called Lewis an "aberration." State v. Vainio, 466 A.2d at 477. (A-23)

Prior to the Lewis decision, there was a conflict among the circuits. See United States v. Lufman, 457 F.2d 165 (7th Cir. 1972) in which the court reversed a conviction under §1202(a)(1) obtained on the basis of an unconstitutional felony conviction. The Fourth Circuit's decision in Lewis was by a margin of two to one. Lewis itself was a six to three decision. The reasoning expressed by Judge Winter in dissent in the Fourth Circuit, by the judges in the Seventh Circuit who had

resolved this issue in the opposite way, and of the commentators, should not be disregarded lightly. In a recent case note, 14 Akron L. Rev. 155 (1980), the author states: "For the first time since Gideon v. Wainwright, the Court appears to have turned its back to the importance of the Sixth Amendment right to counsel." She predicts that the court will at some point, "be forced to reconcile the conflicting holdings of Baldasar and Lewis. The resolution of that confrontation will have an important impact on the administration of criminal justice." 14 Akron L. Rev. at 165. Vainio v. Maine is the case in which that conflict has to be addressed and, hopefully, resolved.

The Court itself is acutely aware of the four cases previously thought to have

developed a standard against which Lewis cannot stand. In those four cases the Court held as follows:

> Gideon v. Wainwright, 372 U.S. 335 (1963), that a state felony conviction without counsel and without valid waiver of counsel was unconstitutional under the Sixth and Fourteenth Amendments;
>
> Burgett v. Texas, 389 U.S. 109 (1967), that a conviction invalid under Gideon could not be used for enhancement of punishment under a state's recidivist statute;
>
> United States v. Tucker, 404 U.S. 443 (1972), that a conviction invalid under Gideon could not be considered by the court in sentencing a

defendant under a subsequent conviction;

Loper v. Beto, 405 U.S. 473 (1972), that the use of a conviction invalid under Gideon to impeach the general credibility of the defendant was impermissible.

Although this Court distinquished Lewis from the foregoing four cases, the distinction has not stood the test of scrutiny. The difficulty of cases such as United States v. Panter, 688 F.2d 268 (5th Cir. 1982), which found that self-defense must be an unwritten exception to the proscriptive language of 18 U.S.C. App. §1202(a) even after the Lewis Court said that, "This statute could not be more plain," (445 U.S. at 63) shows that Lewis did not offer final, clear and definite guidelines. The Maine Law Court's decision

in State of Maine v. Vainio shows that the Lewis decision has been relied upon to expand the use of unconstitutional convictions. This case of Maine v. Vainio requires a reconsideration and reversal of the Lewis case.

Dated: March 2, 1984

JAMES E. MITCHELL, ESQ.

(This decision is officially reported at 466 A. 2d 471)

MAINE SUPREME JUDICIAL COURT
Reporter of Decisions
Decision No. 3341
Law Docket No. Pen-82-343

STATE OF MAINE

V.

CARL VAINIO

Argued June 17, 1983
Decided October 5, 1983

Before McKUSICK, C.J., NICHOLS, VIOLETTE and WATHEN, JJ., and DUFRESNE, A.R.J.

DUFRESNE, A.R.J.

At a jury trial in July, 1982, in the Superior Court, Penobscot County, Carl Vainio, the defendant, was found guilty of the crime of having a firearm in his possession or under his control contrary to the provisions of 15 M.R.S.A. §393, which prohibits a person who has been convicted of a crime punishable by one year or more imprisonment from owning

or having in his possession or under his control any firearm, unless such a person has obtained a permit from the Commissioner of Public Safety.

On appeal, Vainio contends (1) that, because his underlying previous theft conviction, if graded under title 17-A, section 362, of the Maine Criminal Code, would be a Class E crime punishable by imprisonment for a period not to exceed 6 months, he was not a member of the class of persons convicted of a crime punishable by one year or more imprisonment contemplated by section 393 of title 15, (2) that this statute as applied to him in the instant case operates as an ex post facto law in violation of both the Constitutions of the State of Maine and of the United States, and (3) that his 1962 felony conviction of larceny was null and void, in that it was obtained as a result of his plea of guilty to the

charge without the benefit of his constitutional right to assistance of counsel. We affirm the Superior Court judgment.

Facts

In September, 1961, Carl Vainio was indicted by the Grand Jury in Piscataquis County for stealing brass pipes belonging to Guilford Woolen Mills, Inc. alleged to be of the value of one hundred ninety-two dollars and twenty cents ($192.20), a felony under R.S. ch. 132, §1 (1954).[1] At

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[1] R.S. ch. 132, §1 (1954) provided in pertinent part as follows:

> Whoever steals, takes and carries away, of the property of another, money, goods or chattels, or ... is guilty or larceny; and shall be punished, when the value of the property exceeds $100, by imprisonment for not less than 1 year nor more than 5 years; and when the value of the property does not exceed $100, by a fine of not more than $100 or by imprisonment for not more than 6 months, or by both such fine and imprisonment.

In 1961, every offense punishable by imprisonment in the state prison was a felony. R.S. ch. 145, §1 (1954).

his arraignment in March, 1962, Vainio pleaded guilty to the charge and was sentenced to the Men's Reformatory. The execution of the sentence was suspended, however, and he was placed on probation for the period of two years. A special condition of probation consisted in making restitution in the sum of ninety-six dollars and twenty cents ($96.20). Vainio entered his guilty plea to the alleged felony without the assistance of counsel, the printed record form indicating

"Respondent inquired of if he wished Counsel, REPLY: No." The record does show that Vainio was discharged from probation in March, 1964. That conviction has never been vacated, nor has the

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(footnote 1 cont.)

Also, unless otherwise specially provided, all imprisonments for 1 year or more had to be in the state prison. R.S. ch. 149, §4 (1954).

defendant ever been pardoned in connection therewith, nor did he obtain a permit from the Commissioner of Public Safety to possess or have under his control a firearm pursuant to 15 M.R.S.A. §393.

On January 4, 1982, Vainio was indicted for having in his possession or under his control on or about December 31, 1981, a firearm, the accusation further charging that he had been convicted on March 16, 1962, of the crime of larceny, a felony under the laws of the State of Maine punishable by one year or more imprisonment, all in violation of 15 M.R.S.A. §393.[2] The evidence at trial did

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[2] The indictment contained two other counts, one for attempted aggravated assault, a Class C crime, 17-A M.R.S.A. §§152, 208, the other for criminal threatening with a firearm, a Class D crime, 17-A M.R.S.A. §209. At trial, Vainio's motion for judgment of acquittal was granted respecting the charge of attempted aggravated assault,

indicate, and Vainio did not deny, that on the alleged occasion he did have in his possession two firearms, a .357 Magnum and a .270 Browning rifle. Defense counsel at trial sought to attack the validity of Vainio's 1962 theft conviction, but the trial justice would not permit it.

Applicability of 15 M.R.S.A. §393

The defendant contends on appeal that, although his 1962 theft conviction was at the time punishable by one year or more imprisonment, it does not come within the scope of the prohibition created by 15 M.R.S.A. §393. He asserts that, when the Legislature enacted in 1977 the current section 393 prohibiting ownership, possession or control of any firearm to any person

(footnote 2 cont.)

and the jury found him not guilty of the offense of criminal threatening with a firearm.

> who has been convicted of any crime, under the laws of the United States, the State of Maine or any other state, which is punishable by one year or more imprisonment...,

it was referring to convictions which under the punishment classifications of the Maine Criminal Code effective May 1, 1976, are punishable by one year or more imprisonment.[3] Since his 1962 theft conviction involved property valued at less that $500, Vainio argues that he had not been convicted of a crime under the laws of the State of Maine which is punishable by one year or more imprisonment within the scope of the present section 393. We disagree.

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[3] 17-A M.R.S.A. §32 of the Maine Criminal Code provides as follows:

Classification of theft offenses

1. All violations of this chapter [the chapter on theft] shall be classified, for sentencing purposes, according to this section. ... .

5. Theft is a Class E crime if the value of the property or services does not exceed $500.

At the time of the defendant's underlying conviction of theft, the law regulating the possession of firearms made illegal the possession by convicted felons of concealable firearms, except that it did not apply to any person who had not been subsequently convicted of a penal offense during the 5-year period next immediately following his discharge or release from prison. P.L. 1955, ch. 310. That statute, codified later as 15 M.R.S.A. §393, was repealed by P.L. 1977, ch. 225 §2, which enacted in its place the current section 393, the Legislature expanding the scope of illegality to include the ownership and control as well

(footnote 3 cont.)

17-A M.R.S.A. §1252
Imprisonment for crimes other than murder

2. The court shall set the term of imprisonment as follows:

E. In the case of a Class E crime, the court shall set a definite period not to exceed 6 months.

as the possession of any firearm, concealable or non-concealable. The Legislature at the same time modified the terminology describing the class of persons within the prohibition from "any person who has been convicted of a felony" to "any person who has been convicted of any crime ... which is punishable by one year or more imprisonment." This modification, however, made necessary by the adoption in the Maine Criminal Code of a new crime-classification prescript replacing the former felony-misdemeanor dichotomy, did not constitute an express rejection of the superseded proscriptions, but rather merely carried over the concept of the displaced statute to meet the Code's new concepts in crime categorization.

The starting point in any given case concerning the interpretation of a statute must be the language of the

statute itself. Indeed, legislative intent oftentimes is readily ascertainable from the plain meaning of the words used in the statute. State v. Hussey, 381 A.2d 665, 666-67 (Me. 1978); State v. Granville, 336 A.2d 861, 863 (Me. 1975). Unless the statute itself discloses a contrary intent, words in a statute must be given their plain, common and ordinary meaning, such as men of common intelligence would usually ascribe to them. State v. Snow, 383 A.2d 1385, 1388 (Me. 1978); State v. Heald, 382 A.2d 290, 294 (Me. 1978); State v. Shaw, 343 A.2d 210, 213 (Me. 1975). The effect of a penal statute cannot be extended or restricted beyond the plain meaning of the language chosen by the Legislature. Davis v. State, 306 A.2d 127, 129 (Me. 1973).

An examination of the current section 393 reveals that the legislative restriction placed upon the ownership,

possession or control of any firearm, concealable or nonconcealable, absent a permit from the Commissioner of Public Safety, is directed in broad and sweeping statutory language at any person "who has been convicted of any crime, under the laws of the United States, the State of Maine or any other state, which is punishable by one year or more imprisonment." Nothing on the fact of the statute indicates that the past convictions to which the Legislature was referring were convictions of crimes other than crimes which at the time of their commission in the jurisdiction where committed carried the potential punishment by one year or more imprisonment. This is the natural import of the legislative phraseology. Any interpretation which would make the disabling character of past convictions to depend on the vagueries of subsequent legislative changes in the punitive

consequences which a legislature might at a later time impose for similar conduct, would effectively destroy the uniform package which our legislators had undoubtedly in mind, when in 1977 they concluded that there was not only need for updating the existing gun control leglislation in the case of convicted criminals on account of the recent adoption of the Maine Criminal Code, but also that there was a demand for greater control of firearms in the hands of that class of persons who presented a high potential of danger to the public by reason of their having been convicted of a felony or conduct which at the time was considered a serious offense. If the Legislature, in its reference to persons who have been convicted of crimes punishable by one year or more imprisonment, had intended that, in the case of convictions antedating the adoption of the

Maine Criminal Code, the penalty criterion would have reference to the crime classifications of the Code including those for theft offenses, it would have been an easy task to have so indicated specifically. The obvious breadth of the all-inclusive language of the statute, together with the factual expansion of the statutory disability to include ownership, possession and control of non-concealable firearms as well as concealable firearms, effectively militates against the defendant's contention that the Legislature did intend to relieve convicted felons from the imposed firearm ineligibility if their past conduct, when viewed in the light of the Maine Criminal Code penalty provisions, would not currently qualify as a felonious or serious crime. The Legislature has demonstrated that this statute was to be interpreted broadly and not

constricted within narrow channels. Indeed, the same One Hundred and Eighth Legislature in 1977, (P.L. 1977, ch. 564, §72) made sure that the term "convicted" as used in 15 M.R.S.A. §393, sub-§ 1, as enacted by P.L. 1977, ch. 225, §2, would have broad coverage, amending the statute to include the following:

> For the purposes of this subsection, a person shall be deemed to have been convicted upon the acceptance of a plea of guilty or nolo contendere or a verdict or finding of guilty by a court of competent jurisdiction.

Similarly, if the language of this subsection had been meant to be restricted by the penalty criteria of the Maine Criminal Code in respect to previous felony convictions, it could and would most probably have been done at the time of this amendment.

Hence, we hold that under the plain meaning of the statute the defendant did belong to that class of persons for whom

ownership, possession or control of any firearm was prohibited, absent a permit from the Commissioner of Public Safety.

Ex post facto law

Vainio next asserts that, prior to the enactment of the current section 393 of title 15 M.R.S.A. in 1977, it was lawful for him to possess firearms capable of being concealed upon the person after the expiration of five years from the date of the termination of probation, that is, after March, 1969.[4] He now contends that, if applicable to him, the

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4 15 M.R.S.A. §393 then reads as follows:

It shall be unlawful for any person who has been convicted of a felony under the laws of the United States or of the State of Maine, or of any other state, to have in his possession any pistol, revolver or any other firearm capable of being concealed upon the person until the expiration of 5 years from the date of his discharge or release from prison or termination of probation. Such a person convicted of any offense, except misdemeanors, the maximum punishment for which is a fine of $100 or less, or imprisonment for 90 days or less, during

1977 amendment which would deprive him of an unconditional right to possess concealable firearms and compel him to apply to and secure a permit from the Commissioner of Public Safety for continued enjoyment of the privilege, would in fact inflict a punishment for past violation of law more severe than was prescribed for the criminal offense of which he had been convicted or would deprive him of some protection to which he had become entitled. This additional deprivation of personal prerogative, Vainio claims, violates both the Constitutions of the State of Maine and of the United States

(footnote 4 cont.)

the 5-year period, shall be forever barred from having in his actual or constructive possession any of the weapons described herein. Anyone violating any of the provisions of this chapter shall be guilty of a felony, and upon conviction thereof, shall be punished by imprisonment for not less than one nor more than 5 years. (Emphasis supplied).

which proscribe ex post facto laws. See Me. Const. art. I, §11 and U. S. Const. art. I, §10.

In State v. Myrick, 436 A.2d 379 (Me. 1981), this Court dealt with this issue in similar circumstances. After adopting the test articulated in Cases v. United States, 131 F.2d 916 (1st Cir. 1942), the Myrick Court determined that the 1977 amendment was enacted "to lessen 'a high potential of danger to the public' and to reduce the 'probability that the convicted individual would continue his criminal activity.' The Legislature could justifiably conclude there was a need for [more] gun control legislation in the case of convicted criminals" (quoting State v. Heald, 382 A.2d 290, 295 (Me. 1978). This Court then decided that the current section 393 was not enacted for the purpose of imposing an additional penalty for past conduct, but

rather was designed to regulate more closely the ownership, possession and control of firearms by those who, because of prior convictions of crimes punishable by a year or more imprisonment, had demonstrated their unfitness to be entrusted with dangerous weapons.

We conclude again, as we did in Myrick, that the current section 393 does not implicate the constitutional ex post facto prohibition, since there does exist a sufficiently rational connection between a defendant's past conviction of crime punishable by imprisonment for a period of a year or more and the legislative purpose in the present law to protect the public against the indiscriminate use of firearms by such class of convicted persons; nor does the present statute deprive the defendant of some protection to which he was constitutionally entitled.

Collateral Attack

Lastly, Vainio argues that, in the face of a silent record where no evidence appears to demonstrate that in 1962 he knowingly, intelligently and voluntarily waived his constitutional right to the assistance of counsel before entering his guilty plea to the charge of larceny, his present conviction of possession or control of a firearm by a person convicted of a crime punishable by a year or more imprisonment cannot stand and must be reversed. We disagree.

This brings up the issue, whether the underlying 1962 conviction of theft could be collaterally attacked by Vainio in the present prosecution for alleged unlawful possession of a firearm. In Lewis v. United States, 445 U.S. 55, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980), the United States Supreme Court addressed an issue very similar to the one presented

in the instant case. In 1961, Lewis had been convicted of a felony based upon a plea of guilty. In 1977, he was convicted of knowingly receiving and possessing a firearm by a felon. Lewis argued that he was not represented by counsel when he pleaded guilty to the 1961 felony which forms the basis of his subsequent conviction. 445 U.S. at 56-58, 100 S.Ct. at ____, 63 L.Ed.2d at 204. He based his attack on both statutory and constitutional grounds. 445 U.S. at 60, 100 S.Ct. at ___, 63 L.Ed.2d at 206. The Court determined that the statute itself did not expressly give a defendant the right to question collaterally the validity of the underlying conviction on constitutional grounds as a defense to the charge of possession of a firearm by a criminal defendant. 445 U.S. at 65, 100 S.Ct. at ___, 63 L.ED.2d at 209. Addressing the constitutional challenge, the Court noted

that it had never suggested that an uncounseled conviction was invalid for all purposes.[5] 445 U.S. at 66-67, 100 S.Ct. at ___, 63 L.Ed.2d at 210. The

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[5] The Court recognized that in several cases it had found unconstitutional the use of uncounseled felony convictions for certain purposes. Lewis, 445 U.S. at 59-60, 66, 100 S.Ct. at ___, ___, 63 L.Ed.2d at 205-06, 210. The Court indicated that in Burgett v. State of Texas, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967), it held that a constitutionally invalid uncounseled conviction could not be used as a prior conviction for the purposes of a recidivist statute that operated to enhance a jail sentence; also, in United States v. Tucker, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972), that such a conviction could not be considered by a judge when sentencing a defendant for a subsequent conviction; and in Loper v. Beto, 405 U.S. 473, 92 S.Ct. 1014, 31 L.Ed.2d 374 (1972), that such a conviction could not be used to impeach a defendant's credibility. Lewis, 445 U.S. at 59-60, 100 S.Ct. at ___, 63 L.Ed.2d at 205-06. The Lewis Court distinguished these cases from the current case on the following grounds:

> In each of those cases, this Court found that the subsequent conviction or sentence violated the Sixth Amendment because it depended upon the reliability of a past uncounseled conviction. The federal

Court held that the "firearms prosecution does not open the predicate conviction to

(footnote 5 cont.)

> gun laws, however, focus not on reliability, but on the mere fact of conviction, or even indictment, in order to keep firearms away from potentially dangerous persons. Congress' judgment that a convicted felon, even one whose conviction was allegedly uncounseled, is among the class of persons who should be disabled from dealing in or possessing firearms because of potential dangerousness is rational. Enforcement of that essentially civil disability through a criminal sanction does not "support guilt or enhance punishment," see Burgett, 389 U.S. at 115, 19 L.Ed.2d 319, 88 S.Ct. 258, on the basis of a conviction that is unreliable when one considers Congress' broad purpose. Moreover, unlike the situation in Burgett, the sanction imposed by §1202(a)(1) attaches immediately upon the defendant's first conviction. [Footnote omitted.]

Lewis, 445 U.S. at 67, 100 S.Ct. at ___, 63 L.Ed.2d at 210.

Most recently, in Baldasar v. Illinois, 446 U.S. 222, 100 S.Ct. 1585, 64 L.Ed.2d 169 (1980) (per curiam), the Court held that an uncounseled misdemeanor conviction, though constitutionally valid, could not be used as a predicate conviction under an enhanced

to a new form of collateral attack."[6] 445 U.S. at 67, 100 S.Ct. at ___, 63 L.Ed.2d at 211. We agree with the principals set forth in Lewis. We hold that a person charged with possession of firearms prohibited under 15 M.R.S.A. §393 for persons convicted of crimes punishable by one year or more imprisonment cannot collaterally attack the underlying

(footnote 5 cont.)

penalty statute to convert a subsequent misdemeanor into a felony with a prison term. The distinction of Burgett, Tucker, and Loper that the Lewis Court made also serves to distinguish Baldasar.

6

The Lewis decision has received much criticism, especially from the dissenters. Lewis, 445 U.S. at 68, 100 S.Ct. at ___, 63 L.Ed.2d at 211 (Brennan, Marshall, Powell, JJ., dissenting). Commentators call Lewis an "aberration." Comment, Constitutional Law: Sixth Amendment -- Right to Counsel -- Use of Prior Uncounseled Convictions, 14 Akron L.Rev. 155 (1980); Note, Sixth Amendment Limits on Collateral Uses of Uncounseled Convictions, 91 Yale L.J. 1000-17 (1982).

conviction which serves as a basis for the firearm prosecution, and that in such circumstances there is no violation of the United States Constitution, nor of the State Constitution.[7]

Our position is consistent with our holdings in a number of cases. In Beaulieu v. State, 161 Me. 248, 211 A.2d 290 (1965), the defendant attempted to attack his escape conviction on the basis that he was unlawfully imprisoned for the underlying larceny conviction which he was serving in the reformatory and which had been obtained against him without the benefit of the assistance of counsel.

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7 In Poitraw v. State, 322 A.2d 594 (Me. 1974), the Court considered whether to permit a collateral attack upon a felony conviction which was the basis of a conviction for possession of a firearm by a felon. Denying the appeal on other grounds, the Court in a footnote stated that it did not intimate any opinion upon whether the petitioner could collaterally attack his prior conviction. 322 A.2d 598 n. 6.

Although we decided the case on procedural grounds, we stated that the results would be unchanged even if the merits had been addressed. Beaulieu, 161 Me. at 250, 211 A.2d at 291. We held that a judgment may only be voided in a proceeding directed to the larceny conviction, not to the escape conviction. 161 Me. at 253-54, 211 A.2d at 293. This holding on the merits has been followed in several later cases. State v. Perkins, 277 A.2d 501 (Me. 1971); Chapman v. State, 250 A.2d 696, 697 (Me. 1969); Hamner v. State, 223 A.2d 532, 534-35 (Me. 1966); see also Fuller v. State, 282 A.2d 848, 850 (Me. 1971) (involving an assault upon a guard at the Correctional Center).

The denial to a criminal defendant of collateral attacks upon a conviction has been applied in contexts other than escape. In State v. Higgins, 338 A.2d 159

(Me. 1975), the defendant was convicted of operating a motor vehicle after suspension. On appeal, he attacked the suspension on constitutional grounds. We did not allow such a collateral attack, reasoning that public policy favoring "respect for law" must be held to overbalance a citizen's interest to vindicate rights, even if constitutionally rooted, by a collateral attack initiated by the citizen's resort to "self-help" conduct having independent criminal consequences. 338 A.2d at 162; see also State v. Albert, 418 A.2d 190 (Me. 1980).

Most recently, in State v. Piacitelli, 449 A.2d 1126 (Me. 1982), the defendant appealed his conviction of operating a motor vehicle after revocation of a license under the habitual offender law and sought to attack the underlying suspension on the basis that it was constitutionally invalid. Relying

upon Higgins, we refused to permit such collateral attacks made after resorting to self-help. Piacitelli, 449 A.2d at 1128. Thus, we have consistently disallowed collateral attacks on outstanding underlying adjudications, though based upon constitutional grounds, in cases involving motor vehicle offenses.

We, however, have permitted a collateral attack upon a prior conviction, where that conviction formed the basis of an enhanced sentence under a recidivist statute. In Green v. State, 237 A.2d 409 (Me. 1968), the petitioner collaterally attached an uncounseled robberty conviction that was used pursuant to a recidivist statute to enhance the sentence imposed for a larceny conviction. We held that the robbery conviction was invalid. 237 A.2d 412. Distinguishing Beaulieu, we reasoned that the sentence Green was serving was directly

attributable to the enhancement of the sentence by application of the recidivist statute. Green, 237 A.2d at 411; see Baldasar v. Illinois, 446 U.S. 222, 100 S.Ct. 1585, 64 L.Ed.2d 169 (1980) (per curiam); Burgett v. State of Texas, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967). That rationale also serves to distinguish Green from this case. In addition, Green is distinguishable because the Legislature may rationally seek to prohibit certain convicted persons, even though their prior conviction may be determined on appeal to be invalid, from possessing firearms because of the danger which may be associated with possession of firearms by convicted persons. See Lewis, 445 U.S. at 67, 100 S.Ct. at ___, 63 L.Ed.2d at 210; State v. Heald, 382 A.2d 290, 294-95 (Me. 1978).

We hold, therefore, that under the Maine Constitution a defendant is not

entitled to pursue a collateral attack on an underlying unreversed conviction which forms the basis for prosecution under section 393.

The entry is:

Judgment affirmed.

All concurring.

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Appendix 2

STATE OF MAINE
PENOBSCOT, ss

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
Law Docket No. Pen-82-343

STATE OF MAINE]
]
vs.] ORDER
]
CARL VAINIO]

Upon motion of appellant for rehearing and reconsideration,

It is ORDERED that the motion be, and it hereby is, DENIED.

Dated this fourth day of January, 1984.

For the Court,

s/Vincent L. McKusick
Chief Justice

Appendix 3

(Excerpt from Trial Transcript - Argument of Mark S. Kierstead, Esq., counsel for Carl Vainio.)

191

MR. KIERSTEAD: Correct.

And which brings me to the Baldarar case, Your Honor. That was a case that went to the United States Supreme Court. And if I may paraphrase it or try to state the facts and the holding succinctly to you, this is a gentleman who was convicted of an offense and then -- which was at the time a misdemeanor and then -- but he was sentenced on that and pled guilty on that without the advice of counsel. The State of Illinois later attempted to use that unadvised conviction as the basis for an enhancement of another misdemeanor to the felony level. The Supreme Court of the United States held that without the advice of counsel

even in as small a matter as a $29 theft of, I think it was, bologna and beer, food stuffs of some kind, that without the advice of counsel a prior conviction even of this low a level could not be used against the defendant as a component of a later crime.

And it seems to me that although it is, of course, not directly on point with what we're doing here today, it seems to me that the reasoning is nevertheless analogous; that here we have a 18-year-old boy essentially who walks into court, is charged with stealing some brass pipe and copper pipe from a woolen mill or some other manufacturing place, inquires as to what the story really is, they say, you only really have to pay back $6.20. And without the advice of counsel he then enters a plea. It seems to me it would be reasonable for Mr. Vainio to have assumed at that point in

time in fact what he was pleading to was less than $100 and therefore he was not guilty of a felony.

In any event, it seems that to use a uncounseled plea that is 20-some-odd-years-old now to, in effect, enhance or be a component of another crime, we have the same problem here that the U.S. Supreme Court overturned in Baldasar.